

1 DOUGLAS A. WINTHROP (SBN 183532)
2 Douglas.Winthrop@arnoldporter.com
3 JEREMY T. KAMRAS (SBN 237377)
4 Jeremy.Kamras@arnoldporter.com
5 JOSEPH FARRIS (SBN 263405)
6 Joseph.Farris@arnoldporter.com
7 **ARNOLD & PORTER KAYE SCHOLER LLP**
8 Three Embarcadero Center, 10th Floor
9 San Francisco, CA 94111-4024
10 Telephone: 415.471.3100
11 Facsimile: 415.471.3400

12
13 *Attorneys for Defendants XINGKE*
14 ELECTRONICS (DONGGUAN) CO., LTD.,
15 formerly known as SINCO ELECTRONICS
16 (DONGGUAN) CO., LTD., LIEW YEW SOON
17 aka, MARK LIEW, NG CHER YONG. aka CY
18 NG, and MUI LIANG TJOA aka ML TJOA

19 **WHGC, P.L.C.**
20 Jeffrey C.P. Wang (SBN 144414)
21 JeffreyWang@WHGCLaw.com
22 Michael G. York (SBN 89945)
23 MichaelYork@WHGCLaw.com
24 Kathleen E. Alparce (SBN 230935)
25 KathleenAlparce@WHGCLaw.com
26 Jessica A. Crabbe (SBN. 263668)
27 JessicaCrabbe@WHGCLaw.com
28 1301 Dove Street, Suite 1050
29 Newport Beach, CA 92660
30 Tel. (949) 833-8483; Fax: (866) 881-5007

31
32 **UNITED STATES DISTRICT COURT**
33
34 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
35
36 **SAN FRANCISCO DIVISION**

37 SINCO TECHNOLOGIES PTE LTD.,

38 Plaintiff,

39 vs.

40 SINCO ELECTRONICS (DONGGUAN) CO.,
41 LTD.; XINGKE ELECTRONICS
42 (DONGGUAN) CO., LTD.; XINGKE
43 ELECTRONICS TECHNOLOGY CO., LTD.;
44 SINCOO ELECTRONICS TECHNOLOGY CO.,
45 LTD.; MUI LIANG TJOA (an individual); NG
46 CHER YONG aka CY NG (an individual); and
47 LIEW YEW SOON aka MARK LIEW (an
48 individual),

49 Defendants.

50 Case No. 3:17-CV-05517-EMC

51 Action Filed: September 22, 2017

52 **DEFENDANTS' TRIAL BRIEF**

53 Date: October 5, 2021
54 Time: 3:00 p.m.
55 Place: Courtroom 5, 17th Floor

56 **Judge: Honorable Edward M. Chen**

57 **Trial: November 1, 2021**

1 **I. INTRODUCTION**

2 This case is about the end of a longtime business relationship between Defendant XingKe
 3 Electronics Technology Co. Ltd. (“XingKe”) and Plaintiff SinCo Technologies Pte. Ltd. (“SinCo SG”
 4 or “Plaintiff”). At its core, this was a supplier-distributor relationship—with XingKe manufacturing
 5 products at a factory in the city of Dongguan, China, and SinCo SG serving as a middleman based in
 6 Singapore that bought and then re-sold a portion of the products manufactured by XingKe to a small
 7 group of the largest and most sophisticated makers of consumer electronics in the world. Since the end
 8 of the relationship, SinCo SG has attempted to use litigation to prevent XingKe from competing for
 9 business from those customers. SinCo SG first initiated litigation against XingKe in October 2016 in
 10 the parallel state court action,¹ in which SinCo SG is asserting that XingKe “stole” customer by
 11 misappropriating “confidential information and trade secrets” and leveraging the efforts of alleged
 12 SinCo SG employees “embedded” at XingKe who allegedly had a “duty of loyalty” to SinCo SG
 13 (Defendants Mark Liew and CY Ng).

14 In this action, SinCo SG claims the same harm, but under the alternative theory that XingKe
 15 “confused” these sophisticated customers by using its own name, SinCo Electronics (Dongguan) Co.,
 16 Ltd. (“SinCo DG”), thereby committing trademark infringement under the Lanham Act and other
 17 related torts. The evidence at trial will show that Defendants are not liable, including but not limited
 18 to the following reasons:

19 ***First***, Plaintiff will not be able to meet its burden to prove infringement because XingKe never
 20 used the SinCo name ***without consent***. 15 U.S.C. § 1114(a). It is undisputed that, for many years,
 21 XingKe used the English name SinCo Electronics (Dongguan) Co., Ltd. (“SinCo DG”) with the
 22 consent of Plaintiff based on what Plaintiff has asserted was a verbal agreement. In fact, the evidence
 23 will show that this use was not only with the express permission but also the strong encouragement of
 24 SinCo SG and its principal, Bryan Lim. *See, e.g.*, Ex. A (*Trial Ex. 207*: 2007 email from SinCo SG to
 25 XingKe regarding use of the SinCo logo). SinCo SG now retroactively characterizes this as a limited
 26 license subject to unwritten restrictions, but it was never anything of the sort. No contemporaneous,
 27 pre-dispute evidence will show that. Rather, the evidence will show that XingKe had the right to use

28 ¹ Case No. 16CV30187 in Santa Clara Superior Court (“the State Action”).

1 its former name for any purpose—including for sales independent of SinCo SG—and that Lim /
 2 SinCo SG not only knew about those independent sales for years and never objected (*see, e.g.*, Ex.
 3 B (*Trial Ex. 555*: 2013 email from SinCo SG to XingKe acknowledging XingKe’s independent sales
 4 to U.S. customer), but that Lim benefited from these sales. That is, until Lim sold his shares in
 5 XingKe in 2016, at which point he no longer stood to gain from XingKe’s revenue and, instead,
 6 faced competition from XingKe. It was only *then* that Lim first asserted for many years there had
 7 been “unwritten” limitations on the use of the name. Not only does SinCo’s consent vitiate any
 8 trademark liability, SinCo’s actions here give rise to a number of affirmative defenses to the claim
 9 for infringement, including acquiescence, laches, estoppel, and abandonment via naked licensing.

10 **Second**, even assuming Plaintiff could prove that XingKe’s use of name was actually subject
 11 to restrictions and without consent, XingKe did not use any “SinCo” trademark in a way *likely to*
 12 *cause confusion* or that *caused SinCo SG damages*. The evidence will show that there were only a
 13 handful of relevant customers that formed the U.S. customer base of these companies, and which
 14 were allegedly “confused” by XingKe’s former use of the “SinCo” name. Fatal for SinCo SG’s
 15 claims of “confusion” is that these are literally among the most sophisticated and well-resourced
 16 companies in the world—Google, Apple, Amazon. In contrast to mass market consumers making
 17 point-of-sale decisions based on a glance at the colors on a logo, these sales are for “goods [that]
 18 are expensive and purchased after careful consideration” in complex commercial transactions. *Astra*
 19 *Pharm. Prod., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 1206 (1st Cir. 1983).

20 **Third**, not only are these companies very careful and selective about which companies they
 21 do business with, the evidence will show they were *actually* aware that XingKe and SinCo SG were
 22 distinct companies *well before* making any purchasing decisions. Further, by early 2017, just
 23 months after the dispute erupted, XingKe had already changed its English name and ceased use of
 24 “SinCo” to make a clean break from its former business partner. At that point, SinCo SG had
 25 obtained the chief remedy that a trademark plaintiff typically may obtain—the end of the allegedly
 26 confusing use of the trademark. Yet, SinCo SG has persisted with the case on the premise that it is
 27 entitled to extraordinary and grandiose damages figures—including that extend well beyond early
 28 2017—that are not supported by the facts or the law. Trial will confirm that SinCo SG deserves no

1 such windfall.

2 **II. BACKGROUND - KEY EVIDENCE**

3 **A. Brief History of the “SinCo Group”**

4 Around the year 2000, an earlier version of the company that would later become Defendant
 5 **XingKe** was founded in China as a manufacturing company focused on the design, manufacturing
 6 and production of silicone, rubber, and plastic components. It was called SinCo Silicone Rubber
 7 Producing Co. Ltd. (“**SinCo Rubber**”). SinCo Rubber was founded by XingKe’s longtime
 8 principals—Xu Shugong and Gao Bing Yi—and was also associated with SinCo SG’s principal,
 9 Bryan Lim. Around 2007, SinCo Rubber’s operations were transferred to a new factory complex in
 10 the “Humen Town” area of the city of Dongguan. The new factory was owned by XingKe, which
 11 had been formed as a separate company in 2005. XingKe had three principal beneficial owners: Xu
 12 Shugong, Gao Bing Yi, and Bryan Lim, each of whom held shares through various holding
 13 companies over the years until 2016, when the company was sold to holding companies under the
 14 control of Chinese publicly listed conglomerate Jinlong Machinery & Electronics Co. Ltd.
 15 (“**Jinlong**”) (in the first part of a transaction that would later see ownership transferred to Jinlong
 16 directly in 2017).

17 For many years prior to Jinlong’s acquisition of XingKe, SinCo SG and XingKe conducted
 18 business together, including on certain projects where XingKe manufactured products (generally
 19 parts or components related to electronics products or accessories for electronic components, such
 20 as phone cases) that were sold to SinCo SG and then re-sold by SinCo SG to end customers. Over
 21 the years, XingKe also had numerous independent customers. Over time, XingKe’s business grew
 22 to include direct sales to customers in the U.S., Europe, and elsewhere. Throughout this entire
 23 period, XingKe used the name “**SinCo**” without restriction. This was a mutually beneficially
 24 relationship for a long time, as it allowed SinCo SG to market itself as larger than it was by telling
 25 customers that XingKe was part of a loose grouping of companies called the “**SinCo Group**.” At the
 26 same time, XingKe could sell to any customers it brought in on its own; indeed, XingKe needed to
 27 do so because SinCo SG had no obligation to send it business, and frequently directed business to
 28 separate companies, such as its actual subsidiaries.

1 As SinCo SG has long maintained, this relationship was never formalized via written
 2 contract. Recently, in pretrial filings, SinCo SG has advanced a novel position that the informal
 3 arrangement ended in 2012, when XingKe and SinCo SG signed a temporally-limited “Supply
 4 Agreement” (the “2012 Supply Agreement”). As Defendants have set forth more fully in their
 5 Opposition to Plaintiff’s Motion in Limine No. 3, that 2012 Supply Agreement was not an integrated
 6 agreement concerning trademark rights. It also did not set forth *any* restrictions on XingKe’s right
 7 to use its name to sell to other customers. Further, the 2012 Supply Agreement set a “Term” of one
 8 year. *Id.* § 7 (“This Agreement shall be effective for a term of one (1) year from the both parties’
 9 execution.”). Thus, on January 2, 2013, the 2012 Supply Agreement expired. *Id.* After that time, the
 10 parties once again did business without any general written contract setting the terms of the business
 11 relationship.

12 **B. Defendants CY Ng, Mark Liew, and ML Tjoa**

13 In 2003, SinCo Rubber hired Defendant **CY Ng** (“Ng”) as an Engineering Manager for SinCo
 14 Rubber as set forth in a 2003 letter titled “Offer of Employment.” Ex. C (*Trial Ex.* 502: 2003 SinCo
 15 Rubber-Ng Offer Letter). It is disputed whether Ng became an employee of XingKe or SinCo SG
 16 following the dissolution of SinCo Rubber. However, the facts will show that Ng continued to work
 17 at the XingKe factory at all times, and always identified himself to the outside world as a XingKe
 18 (formerly SinCo DG) employee.

19 In 2013, Defendant **Mark Liew** (“Liew”) was hired as an Engineering Manager, reporting to
 20 Ng. Again, it is disputed whether Liew was an employee of SinCo SG or XingKe. However, the
 21 facts will show that Liew always worked at the XingKe factory, and always identified himself to
 22 the outside world as a XingKe (formerly SinCo DG) employee.

23 In 2016, Defendant **ML Tjoa** (“Tjoa”), who was the CEO of Jinlong at that time, first became
 24 associated with XingKe as a result of its acquisition by Jinlong.

25 **C. The Sale of XingKe**

26 After years of a successful business relationship, around 2014, SinCo SG and XingKe were
 27 facing an uncertain economic future based on market conditions. Separately, XingKe’s longtime
 28 majority owner, Xu Shugong, was fighting a years-long battle with a rare nerve disease. In 2015,

1 Xu told Bryan Lim (who, again, was a minority shareholder in XingKe) that he intended to sell
 2 XingKe because of concerns due to economic concerns and his worsening health problems. Xu
 3 offered Lim and SinCo SG a chance to purchase the company at that time. Lim initially showed
 4 interest, but ultimately offered only a low-ball price that Xu could not accept.

5 That same year, Xu was connected with another prospective, well-funded, and well-
 6 connected buyer—the conglomerate Jinlong. ML Tjoa, who was then the CEO of Jinlong, will
 7 confirm at trial that during the negotiations and purchasing process, Bryan Lim never represented
 8 to him that XingKe was subject to any restriction as to the use of its name or the customers it could
 9 sell to, despite his having direct conversations with Lim during the acquisition process. Jinlong
 10 ultimately did buy the company via a series of transactions in 2016 and 2017.

11 D. The Dispute

12 Following the acquisition of XingKe, the parties continued their business relationship for a
 13 time. Notably, even after the completion of the first phase of the sale in April 2016, SinCo SG still
 14 did not indicate to XingKe that there were any restrictions on the use of the name “SinCo” under its
 15 new ownership. Tjoa’s leadership and the backing of Jinlong opened new doors for XingKe. For
 16 example, by summer 2016, Tjoa had developed a lead on Google business via his longtime
 17 connection, Andy Lim, a Google purchasing manager. During that same period, SinCo SG was
 18 trying to develop Google business to send to its Malaysia factory. It was a known fact that the
 19 companies were competing head-to-head for this business. Ex. D (*Trial Ex. 49*: email between Tjoa
 20 and Google regarding project pitch). However, SinCo SG never told XingKe that there was an issue
 21 with XingKe using its “SinCo” name in the competition for this Google business.

22 The evidence will show that SinCo ultimately lost that competition because it was
 23 outperformed by XingKe’s technical team. The evidence will further show that it was only then,
 24 *after* the Google business was won by XingKe’s superior performance, that SinCo SG first accused
 25 XingKe of violating an alleged agreement between the parties. As will be shown at trial, the story
 26 is similar for the other major customers that SinCo SG now claims were confused. In each case, the
 27 customer knew that SinCo SG was a different entity than XingKe, sometimes because SinCo SG
 28 itself made that clear in a bid for the business. To the extent XingKe secured business from these

1 customers, it was because the customer affirmatively chose to work with XingKe *over* SinCo SG.

2 The breakdown in the parties' relationship progressed quickly after that. XingKe continued
 3 to manufacture and sell products to SinCo SG for a time thereafter for older projects, forcing the
 4 two companies to work together to finish those projects. Despite its rightful claim to use its SinCo
 5 name, in January 2017 (two months after the original lawsuit), XingKe made the decision to cease
 6 use of the name, formally adopting a new English name, XingKe.

7 III. LEGAL ISSUES

8 A. Trademarking Infringement - Use Without Consent

9 As Plaintiff, SinCo SG will have the burden to prove that defendants used the alleged marks
 10 (1) "without consent of the plaintiff" and (2) "in a manner that is likely to cause confusion." 15
 11 U.S.C. § 1114(a); Ninth Circuit Model Jury Instruction No. 15.16; *Century 21 Real Est. LLC v. All*
 12 *Pro. Realty, Inc.*, 600 F. App'x 502, 508 (9th Cir. 2015). *Applied Info. Scis. Corp. v. eBay, Inc.*, 511
 13 F.3d 966, 969–70 (9th Cir. 2007). SinCo SG will be able to prove neither of these elements.

14 It is undisputed that XingKe had permission to use the name "SinCo" for many years under
 15 what Plaintiff alleges was a verbal agreement based on a "handshake deal." Ex. E (excerpt of
 16 deposition of Bryan Lim of April 5, 2019). Indeed, SinCo never attempted to withdraw any alleged
 17 permission at any point. Even after SinCo SG filed its "trade secret" lawsuit in the State Action in
 18 2016, it did not tell XingKe to change its name. However, XingKe nonetheless did that voluntarily
 19 a few months later.

20 It is disputed what the scope of the permission under any oral agreement was—with SinCo
 21 SG claiming that that XingKe had a "geographically limited" license that did not permit it to make
 22 independent sales to U.S. customers under the name "SinCo," and XingKe claiming that no
 23 restrictions existed. To resolve this dispute, evidence concerning how the parties conducted
 24 business before the dispute arose in 2016 is highly probative. *Kennecott Corp. v. Union Oil Co. of*
 25 *California*, 196 Cal. App. 3d 1179, 1189 (1987) ("The conduct of the parties after execution of the
 26 contract and before any controversy has arisen as to its effect affords the most reliable evidence of
 27 the parties' intentions.").

28 SinCo SG has recently taken a new position that the prior permission to use the name

1 “SinCo” was extinguished when the parties executed a “Supply Agreement” in 2012. *See* SinCo
 2 SG’s Motion in Limine No. 3; Ex. F (*Trial Ex.* 535: 2012 Supply Agreement). However, the Supply
 3 Agreement was not a fully integrated contract concerning the trademark license; it therefore did not
 4 extinguish the oral license as a matter of law. *Rutherford v. Palo Verde Health Care Dist.*, No. ED
 5 CV13-01247 JAK (OPx), 2014 WL 12637902, at *6 (C.D. Cal. Nov. 25, 2014) (“Under California
 6 law, the factors to consider when determining whether a contract is integrated are: (i) the presence
 7 of an integration clause, (ii) the language and completeness of a written agreement, (iii) the terms
 8 of any alleged oral agreement and whether they contradict the terms of a written agreement, and (iv)
 9 whether the oral agreement might naturally be made as a separate agreement.”). Further, to the
 10 extent the 2012 Supply Agreement was ever relevant to trademark issues, it expired in 2012 and
 11 was not extended. Accordingly, when the disputed sales occurred (all after that time), there was no
 12 written contract restricting XingKe’s rights.

13 **B. Trademark Infringement - Likelihood of Confusion**

14 If SinCo SG is able to prove that it is the owner of valid registered trademarks and that
 15 XingKe did not have its consent to use “SinCo,” the evidence nonetheless will show that any use of
 16 the SinCo trademarks was not likely to cause confusion under the well-established *Sleekcraft*
 17 factors. *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979) (the factors include:
 18 (1) strength or weakness of the plaintiff’s mark; (2) defendant’s use of the mark; (3) similarity of
 19 plaintiff’s and defendant’s marks; (4) actual confusion; (5) defendant’s intent;
 20 (6) marketing/advertising channels; (7) consumer’s degree of care; and (8) product line expansion).

21 This is not, however, a typical trademark case involving mass-market consumer goods or
 22 services. Here, the key *Sleekcraft* factor will be the degree of care used by the plaintiff’s target
 23 customers. This is because the “sales” here are purchasing decisions by well-resourced international
 24 corporations of the highest conceivable level of sophistication. In such situations, courts have found
 25 there to be little chance of likelihood of confusion:

26 Perhaps the most critical factor that weighs against Astra in our consideration of this
 27 issue is the sophistication of the class of prospective purchasers of the subject
 28 products. If likelihood of confusion exists, it must be based on the confusion of some
 relevant person; *i.e.*, a customer or purchaser. And there is always less likelihood of
 confusion where goods are expensive and purchased after careful consideration.

1
2 *Astra Pharm. Prod., Inc. v. Beckman Instruments, Inc.*, 718 F.2d 1201, 1206 (1st Cir. 1983); *see*
3 *also* McCarthy on Trademarks and Unfair Competition, § 23.101 (5th ed. 2021).

4 The *Astra Pharm.* case is particularly instructive here given that SinCo SG is likely to claim
5 that there was a degree of fleeting confusion by some employees of customers based on the
6 similarity of the names alone. But the law is clear that the confusion must be in a “relevant person”—
7 *i.e.*, the person making the purchasing decision. Thus, in *Astra Pharm.*, the court found it to be
8 significant that there was “no evidence that any temporary confusion that may have occurred
9 regarding the identity of the salesmen had any effect whatever on the ultimate decision of a
10 purchaser whether to buy a particular product.” *Id.* at 1207. *See also Alpha Indus., Inc., Alpha Steel*
11 *Tube & Shapes, Inc.*, 616 F.2d 440 (9th Cir. 1980) (confusion less likely when purchasers are
12 “knowledgeable, sophisticated specialists in their area”).

13 Other *Sleekcraft* factors will also weight decisively in Defendants’ favor. Plaintiff’s mark
14 is inherently weak as a common amalgamation of the words “Singapore” and “company” that has
15 been adopted by countless other companies in Singapore. Further, when XingKe was using its
16 “SinCo” name, it still identified itself as a separate company from SinCo SG, using a different name,
17 email address, website, and other identifiers. XingKe also clearly had no bad intent when it adopted
18 the name SinCo—as Plaintiff admits, it *encouraged* XingKe to use that name, including for its
19 official corporate name. Finally, as discussed below further with respect to damages, but also highly
20 relevant here: There is zero evidence of actual confusion. In other words, not only were these
21 highly-sophisticated customers *unlikely* to be confused, the evidence shows not a single one of them
22 ever *was* confused.

23 **B. Trademark Registration**

24 SinCo SG claims to be the owner of valid and registered U.S. trademarks. Defendants
25 reserve their rights to challenge the validity of the those registered trademarks at trial based on the
26 evidence offered by SinCo SG.

27 **C. Abandonment - Naked License**

28 Defendants also have a legal affirmative defense of abandonment by naked licensing.

1 “Naked licensing” occurs when the licensor “fails to exercise adequate quality control over the
 2 licensee.” *Barcamerica Int’l USA Tr. v. Tyfield Importers, Inc.*, 289 F.3d 589, 596 (9th Cir. 2002);
 3 *Hokto Kinoko Co. v. Concord Farms, Inc.*, 738 F.3d 1085, 1097 (9th Cir. 2013);
 4 *FreecycleSunnyvale v. Freecycle Network*, 626 F.3d 509, 512 (9th Cir. 2010). If naked licensing
 5 exists, the trademark holder is “estopped” from asserting the trademark. *Barcamerica*, 289 F.3d at
 6 596. Further, the absence of an agreement with provisions restricting or monitoring the quality of
 7 goods or services produced under a trademark supports a finding of naked licensing. *Hokto Kinoko*
 8 *Co.*, 738 F.3d at 1097. Contrary to Plaintiff’s claim, the standard of proof to establish a naked
 9 license is a preponderance of the evidence and not clear and convincing. *See Grocery Outlet Inc. v.*
 10 *Albertson’s Inc.*, 497 F.3d 949, 953-54 (9th Cir. 2007) (McKeown, J., concurring) and additional
 11 authorities cited in Defendants Objection to Proposed Jury Instruction No. 22.

12 Here, the evidence will show that SinCo SG never bothered to enter into a formal agreement
 13 concerning its trademarks with XingKe or any of the companies that were associated in the
 14 uncontrolled “SinCo Group.” There were no rules and no restrictions at all on the use of the name—
 15 those were only conjured when Bryan Lim sold his shares and changed his previous *laissez-faire*
 16 policy as to the use of the name “SinCo.” Accordingly, it does not matter that SinCo SG took the
 17 formal steps of registering trademarks, it abandoned those trademarks through its naked licensing.

18 **D. Dilution**

19 There is no evidence at all to support SinCo SG’s claim for dilution. In order to prove
 20 dilution, a mark must first be “widely recognized by the general consuming public of the United
 21 States as a designation of source of the goods or services of the mark’s owner.” 15 U.S.C. §
 22 1125(c)(2). Accordingly, the plaintiff carries the burden of proving the mark is famous to the degree
 23 that is it a “household name.” *Nissan Motor Co.*, 378 F.3d 1002, 1011 (9th Cir. 2004). This is a
 24 “rigorous standard.” *ArcSoft, Inc. v. CyberLink Corp.*, 153 F. Supp. 3d 1057, 1065 (N.D. Cal. Dec.
 25 28, 15). Among the examples the Ninth Circuit has provided of such “famous” marks are “**Tylenol**
 26 **snowboards**, **Netscape** sex shops and **Harry Potter** dry cleaners.” *Nissan Motor Co. v. Nissan*
 27 *Comput. Corp.*, 378 F.3d 1002, 1011 (9th Cir. 2004) (quotations and citation omitted) (emphasis
 28 added). “SinCo” is not even close.

1 **E. Damages - Actual Confusion**

2 Finally, if SinCo SG were to prove liability for infringement, it will still not be able to prove
 3 damages. Indeed, damages are rare in trademark infringement actions. 5 J. Thomas McCarthy,
 4 McCarthy on Trademarks and Unfair Competition § 30:1 (5th ed. 2021) (“A permanent injunction
 5 is the usual and normal remedy once trademark infringement had been found in a final judgment.”);
 6 *id.* § 30:58 (“Some plaintiff’s attorneys carefully counsel their clients in advance that obtaining a
 7 strongly worded injunction should be viewed as a ‘win’ in a trademark infringement case and that
 8 the recovery of a monetary award of any kind is problematical.”).

9 “Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), governs the award of monetary
 10 remedies in trademark infringement cases and provides for an award of … any damages sustained
 11 by the plaintiff.” *Lindy Pen Co. v. Bic Pen Corp.*, 982 F.2d 1400, 1405 (9th Cir. 1993), *abrogated*
 12 *on other grounds*, *Sun Earth, Inc. v. Sun Earth Solar Power Co.*, 839 F.3d 1179 (9th Cir. 2016).
 13 “Damages are typically measured by any direct injury which a plaintiff can prove, as well as any
 14 lost profits which the plaintiff would have earned ***but for*** the infringement.” *Id.* at 1407 (emphasis
 15 added). “Compensatory damages must be established with ‘reasonable certainty’ and not be based
 16 on speculation or conjecture.” *Am. Auto. Ass’n of N. Cal., Nev. & Utah v. Gen. Motors, LLC*, 367
 17 F. Supp. 3d 1072, 1105 (N.D. Cal. 2019) (citing *McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 361
 18 (9th Cir. 1996)).

19 As discussed above with respect to likelihood of confusion, the evidence will show that there
 20 was no actual confusion and therefore no provable injury. Customers like Google do not casually
 21 enter supply relationships based on names that sound familiar. In fact, the process of developing
 22 business with companies like Google is intensive and based on extensive vetting of the possible
 23 supplier—as confirmed by the months of competition for Google between the companies here. The
 24 evidence will show that the customers here were well aware at all relevant times that SinCo and
 25 XingKe were distinct entities.

26 As with most trademark cases, damages are not warranted here. XingKe long ago re-
 27 branded and the companies have gone their separate ways.

1 **H. Equitable Issues**

2 Plaintiff has asserted a claim under California Business & Professions Code Section 17200.
3 In the parallel state action, the Superior Court Judge recently granted summary judgment on
4 Plaintiff's 17200 claim on choice of law grounds. Defendants would expect to bring a similar motion
5 before the Court after trial, as well as Defendants' other defenses to this cause of action. In addition,
6 Defendants have raised certain equitable defenses to Plaintiff's claims that, depending on the results
7 of the trial, would be presented to the Court for resolution, including acquiesce, estoppel, and laches.

8 **IV. CONCLUSION.**

9 Defendants look forward to demonstrating to the jury that Plaintiff's claims are without
10 merit.

12 Dated: September 14, 2021.

ARNOLD & PORTER KAYE SCHOLER LLP

13 By: /s/ Douglas Winthrop
14 DOUGLAS WINTHROP

15 *Attorneys for Defendants*
16 XINGKE ELECTRONICS (DONGGUAN) CO.,
17 LTD., formerly known as SINCO
18 ELECTRONICS (DONGGUAN) CO., LTD.,
19 LIEW YEW SOON aka, MARK LIEW, NG
20 CHER YONG. aka CY NG, and MUI LIANG
21 TJOA aka ML TJOA

CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served a copy of the foregoing DEFENDANTS' TRIAL BRIEF on September 14, 2021.

/s/ Douglas A. Winthrop
DOUGLAS A. WINTHROP